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IN THE

Supreme Court of the United States

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WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART ET AL., PLAINTIFFS IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

DEFENDANTS IN ERROR'S MOTION TO DISMISS. & brief

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1.

The defendants in error respectfully move the court to dismiss the writ of error in this cause and to affirm the judgment heretofore rendered by the Supreme Court of the State of Iowa.

STATEMENT OF FACTS.

Object of Motion.

The plaintiffs in error brought this cause to this court on a writ of error to the Supreme Court of the State of Iowa, claiming that a Federal question was involved which was raised and decided adversely to plaintiffs in error by the Supreme Court of the State of Iowa.

A non-Federal question decisive of this cause was raised and decided by the Iowa Supreme Court adversely to the plaintiffs in error.

In the Iowa Court a fact question and a Federal law question were involved. The fact question was determinative of the contention of plaintiffs in error. The Board of Supervisors of Pocahontas County, Iowa, in strict accord with the Iowa statutes, established a drainage district. This drainage improvement, after the lapse of many years, became inefficient. When such fact was brought to the knowledge of the Board of Supervisors of Pocahontas County, that Board determined that it was expedient to take proper action, under the Iowa statute which vested the board with the power to repair the drainage improvement. This Iowa statute is known as Section 1989-A-21 of the Statutes of the State of Iowa. This statute provides:

> "After the district shall have been established and the improvement constructed * * * the improvement shall at all times be under the control

and supervision of the Board of Supervisors, and it shall be the duty of the Board to keep the same in repair * * * and they may cause the same to be enlarged, reopened, widened, straightened or lengthened for a better outlet."

It is the contention of the plaintiffs in error that the plaintiffs have been deprived of their property without due process of law, for the reason that they had no notice of the proceedings or hearing before the Board of Supervisors of Pocahontas County at any stage of the proceedings which culminated in the repair complained of, and in the action taken by the Board in reference thereto. The determinative fact question was whether the work done by the contractor was such as amounted to the construction of a new improvement or merely repair of the old drainage improvement. This determinative fact question was raised by the plaintiffs in error at every stage of this litigation and was decided by the Supreme Court of Iowa adversely to the contention of the plaintiffs in error. The Supreme Court of Iowa in deciding this case, said:

> "The charge in plaintiff's petition and repeated in argument, that the work contracted for and advertised included a lengthening or extension of the ditch or ditches beyond their original dimensions *is not justified by the record*, but, as we have said, it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part to some extent materially deepened" (R. second paragraph, page 89).

ARGUMENT.

Where a determinative non-Federal question and also a Federal question are involved, the decision of the State Supreme Court on the determinative non-Federal question is conclusive of the rights of the parties to this litigation, notwithstanding an adverse decision of the Supreme Court upon the Federal question raised and involved in this cause. This court has repeatedly held that even the decision by the State Court of a Federal question will not sustain the jurisdiction of the court if another question not Federal, was also raised and decided against the plaintiffs in error, or the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment.

In *Harrison* v. *Morton* (171 U. S. 38, 18 S. C. Rep. 742), the court said, on page 745:

> "It is settled law that to give this court jurisdiction of a writ of error to a State Court, it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it (*Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet, et al.*, 138 U. S. 635, 11 S. C. Rep. 435). It is likewise settled law that where the record discloses that *if a question has been raised and decided adversely to the party*

claiming the benefit of a provision of the Constitution or Laws of the United States, and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment (*Wade* v. *Lawder*, 165 U. S. 624, 17 S. C. Rep. 425)."

Waters Pierce Oil Company v. *State of Texas*, 29 S. C. Rep. 227.

Mellon & Company v. *McCaffrey*, 239 U. S. 134, 36 S. C. Rep. 94.

Section 1989-A-3 of the Code of Iowa, is as follows:

"*Notice of Hearing—Approval of Plan.* Upon the filing of the return of the engineer, if the same recommends the establishment of a levee or drainage district, the Board of Supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets with the approval of the Board of Supervisors, they shall direct the auditor to cause a notice to be given as hereinafter provided: * * * when the plan, if any, shall have been finally adopted by the Board of Supervisors, they shall order the auditor immediately thereafter, to cause notice to be given to the owners of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office * * * of the pendency and prayer of said petition, favorable report thereon by the engineer, and that such report may be amended before final action, the day set for hearing of said petition and report before the Board of Supervisors, and that all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon petition, which notice shall be served, except as otherwise

hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county." * * *

Section 1989-A-6 of the Code of Iowa, is as follows:

"*Assessment of Damages—Appeal.* The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all acreage taken for right of way as shown by plat of engineer, and shall, at least five days before the day fixed by the Board to hear and determine same, file with the county auditor reports in writing showing the amount of damages sustained by each claimant. * * * When the time for final action shall have arrived and after the filing of the report of appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish same, and they shall thereupon appoint said engineer, as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty acre tract of land, and shall file a report of the same with the county auditor, together with a plat and profile thereof, and shall thereupon proceed to determine the amount of damage sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto and any party aggrieved may appeal from

the finding of the Board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district by filing notice with the county auditor at any time within twenty days after such finding and at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal, unless the finding of the District Court shall be more favorable to the appellant or appellants, than the finding of the Board. * * * If the appeal is from the amount of damages allowed, the amount ascertained in the District Court shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the Board of Supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages."

Code Section 1989-A-14, provides:

"*Appeal.* An appeal may be taken to the District Court from the order of the Board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the Board of Supervisors increasing the apportionment within twenty days after the completed service of the notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioners or not."

The decision of the Supreme Court of Iowa determines as a fact question that no new or additional right of way was taken in the work of cleaning, deepening and repairing the ditch; therefore, no real property of the plaintiffs in error was appropriated for public use for this purpose.

There are two theories to the plaintiffs' in error appeal, one being that the assessment levied for this repair constituted the taking of property without due process of law, and, secondly, that the deepening, widening, lengthening, etc., deprived the plaintiffs in error of their property without due process of law. Under our drainage statutes the plaintiffs in error had their day in court in so far as the assessment was made; that is, the assessment for the repair was simply a *pro rata* assessment made in proportion to the original assessment for the cost of construction of the ditch, said assessment for repair being merely a tax for upkeep, and said tax being established on the basis of the original assessment which was made with all the requirements of due process of law in relation to notice, day in court, right of appeal, etc., and surely, there can be no constitutional question as to the validity of the subsequent tax or assessment based on the proportion made at the time that the improvement was constructed, and at which time the plaintiffs in error had the right to object and had the right of appeal, both to the District Court and to the Supreme Court, and this assessment which the plaintiffs in error now complain of is merely and solely a tax for upkeep based on the figures which were found to be correct at the time the improvement was established.

Relative to the second proposition, in that the construction of this repair deprived the plaintiffs in error of their property without due process of law, it is our belief and our thought that this appeal should be dismissed

in that the fact question of whether or not there was a deepening, widening, and lengthening of this ditch was primarily controlling. That is, if there was a finding that there was no actual taking of the property, and the court so found, it would totally eliminate the constitutional question. That is, on the fact question, where our District Court and our Supreme Court found that none of the plaintiffs' in error property had been taken, that finally eliminated the question of whether or not it was taken without due process of law, because, from a logical and a legal standpoint, where both of our courts found that the property, as a fact question, was not taken, we fail to see where the constitutional question is involved; and we do not believe that the Supreme Court of the United States will pass on the moot question of whether or not this property was taken without due process of law, when our own state courts affirmatively held that the property was not taken.

Defendants in error respectfully ask that this writ of error be dismissed and that the judgment of the Iowa Supreme Court be affirmed.

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